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16 Attorneys for Defendant POSTMATES INC.

17 DORA LEE, KELLYN TIMMERMAN, and
18 JOSHUA ALBERT on behalf of themselves
19 and all others similarly situated,

20 Plaintiff,

21 v.

22 POSTMATES INC.,

23 Defendant.

24 CASE NO. 3:18-cv-03421-JCS

25 **DEFENDANT POSTMATES INC.'S NOTICE
26 OF MOTION AND MOTION TO (1) COMPEL
27 ARBITRATION OF KELLYN
28 TIMMERMAN'S CLAIMS AND (2) DISMISS
JOSHUA ALBERT'S CLAIMS;
MEMORANDUM OF POINTS AND
AUTHORITIES**

[Declaration of Ashley Campbell and [Proposed]
Order filed concurrently herewith]

Action Filed: May 8, 2018

Trial Date: None Set

Date: December 14, 2018

Time: 9:30 a.m.

Place: Courtroom G

Judge: Hon. Joseph C. Spero

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on December 14, 2018 at 9:30 a.m., or as soon thereafter as the matter can be heard before the Honorable Joseph C. Spero, in Courtroom G of the above-entitled Court, Fifteenth Floor, 450 Golden Gate Avenue, San Francisco, California 94102, Defendant Postmates Inc. (“Postmates”) will and hereby does move this Court, pursuant to Sections 3 and 4 of the Federal Arbitration Act, 9 U.S.C. §§3–4, and Federal Rule of Civil Procedure 12(b)(6), for an order: (1) compelling individual arbitration of all claims asserted by Plaintiff Kellyn Timmerman and staying her claims pending the completion of arbitration; and (2) dismissing all claims asserted by Plaintiff Joshua Albert.

This Motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the Declaration of Ashley Campbell, all papers and pleadings on file with the Court in this matter, any other matters of which the Court may take judicial notice, and any oral argument of counsel.

Dated: November 5, 2018

GIBSON, DUNN & CRUTCHER LLP

By: /s/ Theane Evangelis
Theane Evangelis

Attorneys for Defendant POSTMATES INC.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This Court has already enforced Defendant Postmates Inc.’s arbitration agreement and ordered Plaintiff Lee’s claims to individual arbitration. Plaintiffs Timmerman and Albert likewise should not be permitted to proceed with this action in this Court because Timmerman’s claims must be compelled to arbitration, and Albert’s claims must be dismissed with prejudice for failure to state a claim for relief and other pleading deficiencies.

First, this Court should grant Postmates’ motion to compel individual arbitration of Timmerman’s claims. Like Lee, when Timmerman signed up to access Postmates’ online platform and perform deliveries as an independent contractor, she accepted Postmates’ Fleet Agreement, which contains a conspicuous Mutual Arbitration Provision. By accepting the Fleet Agreement—which this Court has already found constitutes a valid and enforceable contract—and failing to validly opt out of the Mutual Arbitration Provision, Timmerman agreed to resolve any disputes with Postmates through individual arbitration. Moreover, Plaintiffs’ addition of a claim for purported “public injunctive relief” does not exempt Timmerman from arbitration under *McGill v. Citibank, N.A.*, 2 Cal. 5th 945, 961 (2017). This Court has already rejected that argument as to Lee, and it should do so again as to Timmerman on the grounds that Plaintiffs have not sought “public injunctive relief” and because *McGill* is preempted by the FAA. *See Order Regarding Motion to Compel Arbitration and Motion for Leave to File Amended Complaint (“Order”), Dkt. 31, at 16; see also Magana v. DoorDash, Inc., No. 18-cv-03395-PJH, 2018 WL 5291988, at *7 (N.D. Cal. Oct. 22, 2018)* (plaintiff seeking injunctive relief for Labor Code claims did not assert a claim for “public injunctive relief” under California law). Thus, under the FAA, and for the same reasons that this Court compelled arbitration of Lee’s claims, the parties’ agreement must be enforced and Timmerman must individually arbitrate her claims against Postmates. Timmerman’s claims must also be stayed pending the completion of arbitration.

Second, the Court should dismiss Albert's claims with prejudice because Albert fails to allege facts sufficient to show plausible entitlement to relief on any of the First Amended Complaint's six causes of action. The First Amended Complaint is comprised of nothing more than boilerplate

1 recitals of the legal elements of Albert’s claims and conclusory allegations without any factual
 2 support. Moreover, Albert’s “willful misclassification” claim fails for the additional reason that no
 3 private right of action exists under section 226.8. And his breach of contract claim must be dismissed
 4 because it is preempted by his section 204 claim. These multiple, significant deficiencies in the First
 5 Amended Complaint are fatal to and require dismissal with prejudice of Albert’s claims.

6 Accordingly, Postmates respectfully requests that this Court grant its motion to compel
 7 individual arbitration as to Timmerman’s claims and grant its motion to dismiss Albert’s claims.

8 II. FACTUAL AND PROCEDURAL BACKGROUND

9 A. Postmates’ Fleet Agreement and Mutual Arbitration Provision

10 Postmates provides and maintains an online marketplace and mobile platform connecting
 11 individual customers with local merchants and independent contractor couriers to facilitate the
 12 purchase, fulfillment, and, when applicable, delivery of goods from merchants to customers.
 13 Declaration of Ashley Campbell (“Campbell Decl.”) ¶ 2. When customers place orders for delivery
 14 from local merchants through Postmates’ online platform, nearby couriers receive a notification and
 15 can choose, at their discretion, whether to accept an offer to pick up and complete the delivery. *Id.*

16 When new couriers sign up to access delivery opportunities through the Postmates mobile
 17 platform, they must follow a “click-through” process, during which prospective couriers are
 18 presented with a link to a copy of the Fleet Agreement. Campbell Decl. ¶ 4. When couriers are
 19 presented with this link, they may review the terms of the Fleet Agreement and then must click
 20 “Agree” or “Dismiss” after the statement, “I agree to the Fleet Agreement” before proceeding. *Id.*
 21 ¶ 5; *see also* Order at 7–8 (courts applying California law have typically held that such “click-
 22 through” processes are “sufficient to establish contract formation”). Couriers who click the link are
 23 presented with the following all-caps text on the first page of the Fleet Agreement:

24 **IMPORTANT: PLEASE REVIEW THIS AGREEMENT CAREFULLY. SPECIFICALLY,
 25 PLEASE REVIEW THE MUTUAL ARBITRATION PROVISION IN SECTION 11,
 26 WHICH REQUIRES THE PARTIES (UNLESS YOU OPT OUT OF ARBITRATION AS
 27 PROVIDED BELOW) TO RESOLVE DISPUTES ON AN INDIVIDUAL BASIS, TO THE
 28 FULLEST EXTENT PERMITTED BY LAW, THROUGH FINAL AND BINDING
 ARBITRATION. BY ACCEPTING THIS AGREEMENT, YOU ACKNOWLEDGE THAT
 YOU HAVE READ, UNDERSTOOD, AND VOLUNTARILY AGREED TO ALL OF THE
 TERMS OF THIS AGREEMENT, INCLUDING THE MUTUAL ARBITRATION**

1 PROVISION, AND THAT YOU HAVE TAKEN TIME TO CONSIDER THE
 2 CONSEQUENCES OF THIS IMPORTANT BUSINESS DECISION.

3 Campbell Decl. Exs. C, D (emphasis added). The very first sentence of the Fleet Agreement further
 4 informs couriers that they will be “engaged in the business of performing . . . delivery services” as
 5 “an independent contractor.” Campbell Decl. Ex. D. As independent contractors, couriers
 6 acknowledge that they will be “free to select those times [they] wish[] to use the Postmates Platform
 7 to be available to receive Delivery Opportunities” and “free to accept, reject, or ignore any particular
 8 Delivery Opportunities made available to Contractor through the Platform as [they] see[] fit to
 9 maximize [their] opportunity to profit.” *Id.* Couriers also acknowledge that they “ha[ve] the sole
 10 right to control the manner in which Deliveries are performed and the means by which those
 11 deliveries are completed.” *Id.*

12 The Mutual Arbitration Provision, contained in Section 11 of the Fleet Agreement, broadly
 13 provides that Postmates and couriers “mutually agree to resolve any disputes between them
 14 exclusively through final and binding arbitration instead of filing a lawsuit in court.” *Id.* Exs. C
 15 § 11A, D § 11A. The Mutual Arbitration Provision also states that couriers “expressly agree that this
 16 Mutual Arbitration Provision is governed exclusively by the Federal Arbitration Act (9 U.S.C. §§ 1–
 17 16),” and that the Mutual Arbitration Provision “shall apply to any and all claims between the Parties,
 18 including but not limited to those arising out of or relating to . . . *the Contractor’s classification as*
 19 *an independent contractor . . .* and all other aspects of the Contractor’s relationship with Postmates.”
 20 *Id.* Exs. C § 11A(i), D § 11A(i) (emphasis added); Order at 7–9 (holding that Fleet Agreement and
 21 Mutual Arbitration Provision were valid and covered Plaintiff Dora Lee’s misclassification claims).
 22 The Fleet Agreement also provides that “any dispute relating to the interpretation, applicability,
 23 enforceability, or formation” of the Mutual Arbitration Provision (with the exceptions of the class
 24 action and representative action waiver provisions) must be decided “only [by] an arbitrator, and not
 25 any federal, state, or local court.” *Id.* Exs. C § 11A(ii), D § 11A(ii) (emphasis added).

26 Two provisions of the Mutual Arbitration Provision also warn couriers that by accepting the
 27 Mutual Arbitration Provision, they agree to arbitrate their disputes with Postmates on an individual
 28 basis and waive the right to bring class or representative actions. These provisions are captioned
 “CLASS ACTION WAIVER—PLEASE READ” and “REPRESENTATIVE ACTION WAIVER—

1 PLEASE READ” in bold and all-caps text. *Id.* Exs. C § 11B(ii)–(iii), D § 11B(ii)–(iii). The Class
 2 Action Waiver provides that “all disputes or claims between the parties will be resolved in individual
 3 arbitration,” that couriers “waive their right to have any dispute or claim brought, heard or arbitrated
 4 as a class and/or collective action, or to participate in any class and/or collective action,” and that “an
 5 arbitrator shall not have any authority to hear or arbitrate any class and/or collective action.” *Id.* Exs.
 6 C § 11B(ii), D § 11B(ii).

7 The Fleet Agreement also informs couriers at multiple points that they have the right to opt
 8 out of arbitration. The first page of the Fleet Agreement states in all-caps text that couriers will be
 9 required to resolve disputes with Postmates on an individual basis “UNLESS YOU OPT OUT OF
 10 ARBITRATION AS PROVIDED BELOW.” Campbell Decl. Exs. C, D. The Mutual Arbitration
 11 Provision explains that couriers may opt out by submitting an “Opt Out Form” within thirty days of
 12 accepting the Fleet Agreement. *Id.* ¶ 8; *id.* Exs. C § 11B(ix), D § 11B(ix).

13 Couriers who accept the Fleet Agreement are provided with multiple opportunities to review
 14 the Fleet Agreement and the Mutual Arbitration provision. *See Order at 7* (discussing several ways in
 15 which couriers are presented with and may access the Fleet Agreement). In addition to being able to
 16 review the Fleet Agreement during the “click-through” process, couriers are also emailed a copy of
 17 the agreement after they click “Agree.” Campbell Decl. ¶ 5. The Fleet Agreement is also
 18 prominently displayed to couriers in their personalized online portal and Fleet App, which couriers
 19 access using a unique username and password. *Id.* ¶ 6. Furthermore, when Postmates updates the
 20 Fleet Agreement, couriers are again presented with a copy of the Fleet Agreement and prompted to
 21 click “Agree” or “Dismiss.” *Id.* ¶ 7.

22 **B. Plaintiffs Timmerman and Albert**

23 Plaintiff Kellyn Timmerman accepted the Fleet Agreement on May 24, 2017, and by doing so
 24 agreed to resolve any dispute with Postmates—including her classification as an independent
 25 contractor—through final and binding arbitration. Campbell Decl. ¶ 10. Timmerman did not
 26 exercise her right to opt out of the Mutual Arbitration Provision within thirty days. *Id.* On May 11,
 27 2018, Timmerman accepted an updated version of the Fleet Agreement. *Id.* ¶ 11. Under the terms of
 28 the updated Fleet Agreement, Timmerman “acknowledge[d] and agree[d]” that she would not have a

“renewed opportunity to opt out of arbitration” unless the Mutual Arbitration Provision was materially different from a prior one to which she was bound. *Id.* ¶ 12, Ex. D § 1C. On June 1, 2018, Timmerman emailed Postmates attempting to opt out of the Mutual Arbitration Provision, but because the terms of the Mutual Arbitration Provision in the updated Fleet Agreement were not materially different from the terms of the original Mutual Arbitration Provision, her attempted opt-out was not effective. *Id.* ¶ 12; Order at 8 (“The Fleet Agreement does not provide a renewed opportunity to opt out when changes are made to the agreement unless such changes materially affect the arbitration clause,” and the 2017 and 2018 agreements “reflect[ed] materially identical arbitration terms”).

Plaintiff Joshua Albert accepted the Fleet Agreement and agreed to its terms on August 6, 2018, after Postmates filed its motion to compel arbitration of Plaintiff Dora Lee’s claims and stay civil proceedings. Campbell Decl. ¶ 13. Albert completed his first delivery using the Postmates platform on August 17, 2018, three days before Plaintiff Dora Lee filed her motion for leave to amend her complaint and her opposition to Postmates’ motion to compel arbitration and stay civil proceedings. *Id.* Albert emailed Postmates to opt out of the Mutual Arbitration Provision on August 20, 2018 at 1:17 p.m. PDT, just 21 minutes before Plaintiff Dora Lee filed her motion for leave to amend her complaint. *Id.* Albert completed his last delivery using the Postmates platform on August 30, 2018, and is no longer active on the platform. *Id.* ¶ 14.

C. History of this Lawsuit

Plaintiff Dora Lee filed the initial Complaint in San Francisco County Superior Court on May 8, 2018, challenging her classification as an independent contractor. Dkt. 1-1, Ex. B. Postmates removed the action to federal court under the Class Action Fairness Act of 2005 (“CAFA”), 28 U.S.C. §§ 1332(d), 1453, 1711–1715. Dkt. 1-1.

On October 15, 2018, this Court granted Postmates’ Motion to Compel Arbitration of Lee’s claims. Order at 1. Specifically, the Court found that Lee had validly consented to individually arbitrate her disputes with Postmates and could not avoid arbitration by relying on other putative class members’ failure to opt out, the FAA’s “transportation worker” exemption, or her request for “public injunctive relief.” *Id.* at 9, 14, 17. The Court further noted that although Lee attempted to

1 opt out of arbitration under the updated Fleet Agreement, “she was not permitted to do so at that
 2 time,” because Lee was bound by the arbitration agreement in a prior version of the Fleet Agreement.
 3 *Id.* at 8. The Court explained that “[t]he Fleet Agreement does not provide a renewed opportunity to
 4 opt out when changes are made to the agreement unless such changes materially affect the arbitration
 5 clause.” *Id.*

6 On October 22, 2018, after the Court compelled Lee’s claims to individual arbitration,
 7 Plaintiffs filed the First Amended Complaint. The First Amended Complaint alleges six causes of
 8 action for violations of Labor Code sections 2802, 226.8, 1194, 1197, and 204; violation of California
 9 Business and Professions Code 17200, *et seq.*; and breach of contract, all arising out of Postmates’
 10 alleged misclassification of couriers as independent contractors. The First Amended Complaint also
 11 adds two new named plaintiffs and a new “claim” for “public injunctive relief.”

12 Postmates now moves to compel Timmerman’s claims to individual arbitration and to dismiss
 13 Albert’s claims for failure to state a claim upon which relief can be granted under Federal Rule of
 14 Civil Procedure 12(b)(6).

15 III. ARGUMENT

16 A. The Court Should Compel Individual Arbitration of Timmerman’s Claims

17 The First Amended Complaint adds Timmerman as a named plaintiff in this action, even
 18 though Timmerman, like Lee, accepted the Fleet Agreement and failed to effectively opt out of the
 19 Mutual Arbitration Provision. As this Court held in its Order compelling arbitration of Lee’s claims,
 20 the Mutual Arbitration Provision constitutes a valid bilateral arbitration agreement and covers
 21 Timmerman’s dispute with Postmates over her classification as an independent contractor. *See* Order
 22 at 8–9. And as this Court also recognized, the fact that Timmerman purports to seek “public
 23 injunctive relief” does not excuse Timmerman from arbitration. *Id.* at 17. Like Lee, Timmerman is
 24 thus bound under the Fleet Agreement and must resolve her disputes with Postmates in individual
 25 arbitration.

26

27

28

1 **1. Timmerman and Postmates Entered into a Valid Arbitration Agreement that
2 Covers This Dispute**

3 Section 2 of the FAA, which governs this dispute, provides that “[a] written provision in any
4 . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy
5 thereafter arising . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at
6 law or in equity for the revocation of any contract.” 9 U.S.C. § 2 (emphasis added). The court’s role
7 in addressing the question of arbitrability is “limited to determining (1) whether a valid agreement to
8 arbitrate exists, and if it does, (2) whether the agreement encompasses the dispute at issue.” *Chiron*
9 *Corp. v. Ortho Diagnostic Sys. Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). If both requirements are
10 met, the Court must grant a party’s motion to compel arbitration “in accordance with the terms of the
11 agreement.” 9 U.S.C. § 4. As this Court acknowledged in its order compelling arbitration of Lee’s
12 claims, “any doubts concerning the scope of arbitrable issues should be resolved in favor of
13 arbitration.” Order at 6 (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1,
14 24–25 (1983)). Moreover, courts may apply a presumption in favor of arbitration as “an
15 acknowledgement of the FAA’s commitment to overrule the judiciary’s longstanding refusal to
16 enforce agreements to arbitrate and to place such agreements upon the same footing as other
17 contracts.” *Id.* (quoting *Granite Rock Co. v. Int’l Bhd. of Teamsters*, 561 U.S. 287, 299 (2010))
18 (internal quotation marks omitted).

19 The parties may also “clearly and unmistakably” indicate their intent to delegate the two
20 “threshold issues” of arbitrability to the arbitrator, such that the arbitrator has the sole authority to
21 resolve questions relating to the “enforceability, revocability or validity” of an arbitration provision.
22 *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 68–69 (2010); *Mohamed v. Uber Techs., Inc.*, 848
23 F.3d 1201, 1208–09 (9th Cir. 2016); *see also* Order at 2 (noting that under the Fleet Agreement,
24 threshold questions of arbitrability “must be arbitrated”); *Magana*, 2018 WL 5291988, at *7
25 (compelling arbitration of plaintiff’s claims where arbitration agreement contained delegation clause).

26 Here, the parties “clearly and unmistakably” manifested their intent that only an arbitrator, not
27 the Court, may decide the “threshold issues” of arbitrability. *Mohamed*, 848 F.3d at 1208–09. The
28 Mutual Arbitration Provision’s delegation clause provides that “only an arbitrator, and not any
 federal, state, or local court or agency, shall have the exclusive authority to resolve any dispute

1 relating to the interpretation, applicability, enforceability, or formation of th[e] Mutual Arbitration
 2 Provision.” Campbell Decl. Exs. C § 11A(ii), D § 11A(ii) (emphasis added). Thus, only an arbitrator
 3 should decide “(1) whether a valid agreement to arbitrate exists, and if it does, (2) whether the
 4 agreement encompasses the dispute at issue.” *Chiron Corp.*, 207 F.3d at 1130.

5 Should this Court consider the “threshold” arbitrability questions, however, these questions
 6 favor arbitration, as the Court indicated in its Order granting Postmates’ Motion to Compel
 7 Arbitration as to Plaintiff Lee’s claims. In its Order, the Court noted that “courts applying California
 8 law have typically held that procedures like the one employed by Postmates here are sufficient to
 9 establish contract formation.” Order at 8; *see also Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 78–79
 10 (2d Cir. 2017) (mobile app that presented arbitration agreement through contrasting font and “blue
 11 and underlined” hyperlink provided “reasonably conspicuous notice of the Terms of Service as a
 12 matter of California law”); *Swift v. Zynga Game Network, Inc.*, 805 F. Supp. 2d 904, 908, 911–12
 13 (N.D. Cal. 2011) (compelling arbitration and finding videogame user bound by Zynga’s online terms
 14 and conditions); *Cairo, Inc. v. Crossmedia Servs., Inc.*, No. C 04-04825 JW, 2005 WL 756610, at *2,
 15 *4–5 (N.D. Cal. Apr. 1, 2005) (enforcing terms of use where website had a notice that read: “By
 16 continuing past this page and/or using this site, you agree to abide by the Terms of Use for this site”).

17 By following the “click-through” process and accepting the Fleet Agreement, Timmerman
 18 entered into a valid arbitration agreement under California law. During this process, Timmerman
 19 was provided with a conspicuous link to the Fleet Agreement, and she was prompted to click “Agree”
 20 or “Dismiss” after the statement, “I agree to the Fleet Agreement” before proceeding. Campbell
 21 Decl. ¶¶ 4–5. After Timmerman clicked “Agree,” she was provided with a copy Fleet Agreement by
 22 email and through her personalized online portal and the “Fleet App.” *Id.* ¶¶ 5–6. Timmerman was
 23 thus put on notice of and assented to the terms of the Fleet Agreement, including the Mutual
 24 Arbitration Provision. *See* Order at 7–8.

25 Furthermore, Timmerman did not validly opt out of the Mutual Arbitration Provision despite
 26 having an opportunity to do so. In its Order compelling Lee to arbitration, this Court found that
 27 despite multiple belated attempts, Lee did not effectively opt out. The Court explained:
 28

1 “*The Fleet Agreement does not provide a renewed opportunity to opt out when changes are made to the agreement unless such changes materially affect the arbitration clause. . . . compare id. Ex. B (2017 Fleet Agreement) ¶ 11B with id. Ex. C (2018 Fleet Agreement, reflecting materially identical arbitration terms) ¶ 11B.* ***Thus, although Lee attempted to opt out of the 2018 Fleet Agreement on May 22 and 23, 2018, she was not permitted to do so at that time.***”

2
3
4 Order at 8 (emphasis added). The same is true of Timmerman. Like Lee, Timmerman chose not to
5 opt out of the Mutual Arbitration Provision in the Fleet Agreement she accepted when signing up to
6 be a courier on May 24, 2017. Campbell Decl. ¶ 10. By later accepting an updated Fleet Agreement,
7 Timmerman “acknowledge[d] and agree[d]” that she would not have a “renewed opportunity to opt
8 out of arbitration” unless the Mutual Arbitration was materially different from a prior one to which
9 she was bound, which was not the case. *Id.* ¶ 12, Ex. D § 1C. Thus, Timmerman’s attempt to opt out
10 of the Mutual Arbitration Provision on June 1, 2018 was not effective, and she is bound by her assent
11 to the terms of the Fleet Agreement.¹

12 Moreover, the Mutual Arbitration Provision expressly covers all of the claims in this
13 litigation, which are predicated on Plaintiffs’ claim that they were misclassified as independent
14 contractors. *See* FAC ¶¶ 2, 23, 34, 35. Therefore, because the parties entered into a valid arbitration
15 agreement that covers this dispute, and for the same reasons that this Court compelled arbitration of
16 Lee’s claims, Timmerman’s claims must be sent to arbitration.

17 **2. Timmerman’s Agreement to Arbitrate Her Claims on an Individual Basis, Not on
18 Behalf of a Class, Must Be Enforced**

19 The Mutual Arbitration Provision includes a Class Action Waiver that requires Plaintiffs to
20 resolve all disputes through individual arbitration. In *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612,
21 1619 (2018), the U.S. Supreme Court made clear that courts must “enforce arbitration agreements
22 according to their terms—including terms providing for individualized proceedings.” The
23 enforcement of class action waivers, the Court reasoned, is consistent with the fundamental principle
24 that courts must honor contracting parties’ agreements “to specify the rules that would govern their

25 ¹ To the extent Plaintiffs may argue that Albert validly opted out of the Mutual Arbitration
26 Provision and his opt-out may be imputed to other class members, including Timmerman, this
27 Court has already rejected that argument in this case. *See* Order at 9 (“Lee may not avoid
28 arbitration on the basis that other putative class representatives opted out of the arbitration
agreement, when Lee herself did not.”) Nor is Timmerman exempt from arbitration under
Section 1 of the FAA’s “transportation worker” exemption. *See* Order at 14; *see also Magana*,
2018 WL 5291988, at *5.

1 arbitrations,” including “their intention to use individualized rather than class or collective action
 2 procedures.” *Id.* at 1621; *see also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011)
 3 (“[C]lass arbitration . . . is inconsistent with the FAA.”); *Iskanian v. CLS Transp. of L.A., LLC*, 59
 4 Cal. 4th 348, 366 (2014) (recognizing that the FAA preempts state laws that treat employment class
 5 action waivers as unenforceable).

6 Moreover, the delegation clause in the Mutual Arbitration Provision contains a carve-out
 7 exception for questions concerning the agreement’s class and representative action waiver provisions.
 8 Campbell Decl. Exs. C § 11A(ii), D § 11A(ii) (“[T]he [delegation] clause shall not apply to the Class
 9 Action Waiver and Representative Action Waiver.”). Therefore, this Court may properly consider
 10 the enforceability of the Class Action Waiver and should find that the parties’ agreement to
 11 individual arbitration must be enforced according to its terms.

12 **3. Timmerman Cannot Avoid Individual Arbitration of Her Claims by Bringing a
 13 Purported Request for “Public Injunctive Relief”**

14 Plaintiffs’ First Amended Complaint purports to request public injunctive relief, which
 15 Plaintiffs will no doubt contend is another ground on which Postmates cannot compel arbitration of
 16 Timmerman’s claims. *See Motion for Leave to File First Amended Complaint*, Dkt. 15, at 3, n.2
 17 (*citing McGill v. Citibank, N.A.*, 2 Cal. 5th 945, 961 (2017)). The Court has already rejected this
 18 argument in its Order compelling arbitration of Lee’s claims. Order at 17. Moreover, (1) Plaintiffs
 19 do not seek public injunctive relief as that term is used in *McGill*, and (2) *McGill* is preempted by the
 20 FAA.

21 *First*, Plaintiffs have not stated a claim for “public injunctive relief.” In *McGill*, the
 22 California Supreme Court made clear that “[r]elief that has the primary purpose or effect of
 23 redressing or preventing injury to an individual plaintiff—or to a group of individuals similarly
 24 situated to the plaintiff” *does not* constitute “public injunctive relief.” *McGill*, 2 Cal. 5th at 955.
 25 That, however, is exactly what Plaintiffs seek in this action. *See FAC ¶ 36* (Count IV seeking
 26 declaratory and injunctive relief on ground that “[a]s a result of Defendant’s unlawful conduct,
 27 *Plaintiffs and class members suffered injury in fact*” (emphasis added)). Furthermore, Plaintiffs
 28 purport to seek public injunctive relief “in the form of an order requiring Defendant to comply with

1 the California Labor Code,” FAC ¶ 10, but as Judge Hamilton recently explained in another case
 2 brought by Plaintiffs’ counsel, Labor Code violations, by definition, do not threaten future injury to
 3 the general public. *Magana*, 2018 WL 5291988, at *6 (N.D. Cal. Oct. 22, 2018) (granting motion to
 4 compel arbitration and holding that plaintiff’s claims for public injunctive relief under the Labor
 5 Code “would be entirely the opposite of what *McGill* requires—any benefit to the public would be
 6 derivat[ive] of and ancillary to the benefit to DoorDash’s employees” (emphasis in original)).
 7 Because Plaintiffs do not seek “public injunctive relief,” Timmerman’s claims must be compelled to
 8 arbitration.

9 Second, even if Plaintiffs state a claim for “public injunctive relief” (they do not),
 10 Timmerman must still individually arbitrate her claims because the FAA preempts state law, like
 11 *McGill*, that “interferes with fundamental attributes of arbitration.” *Concepcion*, 563 U.S at 344. In
 12 *Concepcion*, the Supreme Court emphasized that “[i]n bilateral arbitration, parties forgo the
 13 procedural rigor and appellate review of the courts in order to realize the benefits of private dispute
 14 resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to
 15 resolve specialized disputes.” *Id.* at 348. To the extent *McGill* permits litigation of public injunctive
 16 relief claims, such a rule would eviscerate the benefits of bilateral arbitration identified in
 17 *Concepcion* by “sacrific[ing] the principal advantage of arbitration—its informality—and mak[ing]
 18 the process slower, more costly, and more likely to generate procedural morass than final judgment.
 19 *Epic Sys.*, 138 S. Ct. at 1623 (quoting *Concepcion*, 563 U.S. at 348). Accordingly, the Court should
 20 do what it stated it was inclined to do at the hearing on Postmates’ motion to compel arbitration of
 21 Lee’s claims, and “throw out the rule of *McGill* as it applies to this because that’s plainly inconsistent
 22 with Supreme Court jurisprudence on this issue.” Transcript of Case Management Conference, Oct.
 23 12, 2018, at 21. And because *McGill* is preempted by the FAA, Plaintiffs’ purported request for
 24 public injunctive relief does not exempt Timmerman from individually arbitrating her claims.

25 **4. Timmerman’s Claims Should Be Stayed Pending the Completion of Arbitration**

26 As with Lee, Timmerman’s claims should also be stayed pending the individual arbitration of
 27 her claims. See Order at 1. The FAA provides that while arbitration is pending, a court “shall on
 28 application of one of the parties stay the trial of the action until such arbitration has been had in

1 accordance with the terms of the agreement.” 9 U.S.C. § 3 (emphasis added). Timmerman’s claims
 2 should thus be stayed.

3 **B. The Court Should Dismiss Albert’s Claims for Failure to State Claims Upon Which
 4 Relief Can Be Granted**

5 In addition to compelling Timmerman’s claims to individual arbitration, the Court should also
 6 dismiss Albert’s claims with prejudice under Federal Rule of Civil Procedure 12(b)(6). To “survive a
 7 motion to dismiss” under Rule 12(b)(6), “a complaint must contain sufficient factual matter, accepted
 8 as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
 9 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “Establishing the plausibility
 10 of a complaint’s allegations . . . ‘requires the reviewing court to draw on its judicial experience and
 11 common sense.’” *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 995–96 (9th Cir.
 12 2014) (quoting *Iqbal*, 556 U.S. at 679); *see also Landers v. Quality Commc’ns, Inc.*, 771 F.3d 638,
 13 641 (9th Cir. 2014), *as amended* (Jan. 26, 2015). While “a court should ‘assume the[] veracity’ of
 14 ‘well pleaded factual allegations,’” allegations that “are no more than conclusions, are not entitled to
 15 the assumption of truth.”” *Eclectic Props. E., LLC*, 751 F.3d at 996 (quoting *Iqbal*, 556 U.S. at 679).
 16 Rule 8 “requires ‘more than labels and conclusions,’” and “plaintiffs must include sufficient ‘factual
 17 enhancement’ to cross ‘the line between possibility and plausibility.’” *Id.* at 995 (quoting *Twombly*,
 18 550 U.S. at 557). “In sum, if the facts alleged foster a reasonable inference of liability—stronger than
 19 a mere possibility—the claim survives; if they do not, the claim must be dismissed.” *Hendricks v.
 20 StarKist Co.*, 30 F. Supp. 3d 917, 924–25 (N.D. Cal. 2014).

21 The Court should dismiss Albert’s claims. Albert never alleges that he actually performed
 22 any deliveries using the Postmates app, nor does he plead facts about any purported deliveries or
 23 what he was paid (or purportedly owed) for those deliveries. Nor does Albert plead facts related to
 24 any out-of-pocket business expenditures he allegedly incurred and for which he now seeks
 25 reimbursement. Rather, the First Amended Complaint simply recites the language of various Labor
 26 Code provisions and contends that Postmates violated them. That is insufficient to state a claim.
 27
 28

1 **1. Albert Fails to State a Claim for Reimbursement of Business Expenses (Count I)**

2 Albert alleges that because Postmates classified him as an independent contractor, he was not
 3 reimbursed for expenses allegedly incurred while performing deliveries using the Postmates platform
 4 pursuant to California Labor Code section 2802. FAC ¶ 21. Albert alleges that such costs generally
 5 included “[couriers’] cost of maintaining their vehicles, gas, insurance, and phone and data expenses
 6 for running the Postmates Application,” but he provides no detail whatsoever about the expenses that
 7 members of the putative class, let alone Albert himself, actually incurred. FAC ¶ 21. Albert’s
 8 allegations thus lack “sufficient ‘factual enhancement’ to cross ‘the line between possibility and
 9 plausibility.’” *Eclectic Props.*, 751 F.3d at 995 (quoting *Twombly*, 550 U.S. at 557).

10 California Labor Code section 2802 provides, in relevant part:

11 An employer shall indemnify *his or her employee* for *all necessary expenditures or losses*
 12 incurred by the employee in *direct consequence of the discharge of his or her duties*, or of his
 13 or her obedience to the directions of the employer, even though unlawful, unless the
 14 employee, at the time of obeying the directions, believed them to be unlawful.
 15

16 Cal. Lab. Code § 2802(a) (emphasis added). Albert fails to establish any entitlement to
 17 reimbursement under section 2802 because he has not provided any non-conclusory allegations to
 18 support his claim.

19 First, the First Amended Complaint contains only conclusory allegations of Albert’s
 20 “expenditures or losses.” Cal. Lab. Code § 2802(a). Albert merely alleges that couriers in general
 21 incurred expenses such as “the cost of maintaining their vehicles, gas, insurance, and phone and data
 22 expenses for running the Postmates Application.” FAC ¶ 21; *see also id.* ¶ 34. But Albert does not
 23 allege a single instance in which he incurred a particular expense that he would not have incurred
 24 otherwise if not for his use of the Postmates platform. Albert does not allege, for example, what type
 25 of vehicle maintenance expenses he incurred, when he incurred them, or whether he would have
 26 incurred them had he not contracted with Postmates. Nor does Albert allege what additional vehicle
 27 insurance expenses he was required to incur as a direct result of his use of the Postmates platform.
 28 Similarly, while the First Amended Complaint includes a single, vague reference to “phone and data
 expenses,” Albert has not alleged that he purchased a cell phone or incurred any related costs as a
 result of his use of the Postmates platform. Indeed, he alleges no facts regarding what kind of cell
 phone service plan he has (i.e., whether it is an unlimited plan, provides a specific amount of minutes

1 or text messages per month, or charges for each individual call or text message), or whether under
 2 that plan he incurred any charges for calls or cellular data as a result of work-related cell phone
 3 usage. Nor does Albert allege that he incurred any work-related expenses in any particular week that
 4 he used the platform. Without factual allegations demonstrating that Albert actually “incurred” out-
 5 of-pocket “expenditures or losses” and specifying at least a single week in which such losses were
 6 incurred, Albert cannot state a plausible section 2802 claim. Conclusory allegations that merely
 7 “set[] forth the elements of the claim” are insufficient under *Twombly* and *Iqbal*. See *Landers*, 711
 8 F.3d at 640; see also *Franke v. Anderson Merchandisers LLC*, No. CV 17-3241 DSF (AFMx), 2017
 9 WL 3224656, at *7 (C.D. Cal. July 28, 2017) (dismissing claim for business expenses where
 10 complaint merely alleged “use of personal phones for business-related purposes, costs incurred to
 11 comply with Defendants’ dress code, and costs incurred using their personal vehicles for work
 12 travel,” but “fail[ed] to provide a single instance when such a cost was incurred”).

13 *Second*, Albert fails to allege facts showing that any allegedly incurred expenses that were
 14 “necessary” to or “in direct consequence” of his use of the Postmates platform. Albert makes only
 15 the conclusory allegation that the unspecified costs he purportedly incurred were a “necessary
 16 expenditure to obtain employment with Postmates,” and that such costs “should have been borne” by
 17 Postmates. FAC ¶¶ 21, 34. But reimbursement of expenses under section 2802 is required only
 18 when the incurred expenses or losses were “necessary” to and “in direct consequence” of an
 19 employee’s “discharge of his or her duties.” Cal. Lab. Code § 2802(a). Section 2802 thus only
 20 requires an employer to reimburse its employees for expenses they “actually and necessarily incur in
 21 performing their employment tasks,” and whether an expense was necessary “depends on the
 22 reasonableness of the employee’s choices.” *Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal. 4th 554,
 23 567–68 (2007). Albert fails to allege facts sufficient to support these essential elements of his
 24 expense reimbursement claim, and his vague and unspecific allegation that he incurred costs as a
 25 “necessary expenditure” to perform deliveries using the Postmates platform is insufficient to cross the
 26 plausibility threshold. As in *Landers*, Albert has made only “generalized allegations” that such
 27 expenses were required, with no supporting factual details about the nature of the purported
 28 requirements. *Landers*, 711 F.3d. at 646.

1 Third, Albert fails to allege any facts establishing that Postmates knew or had reason to know
 2 that he incurred any expenditures subject to reimbursement. “[B]efore an employer’s duty to
 3 reimburse is triggered, it must either know or have reason to know that the employee has incurred an
 4 expense.” *Stuart v. RadioShack Corp.*, 641 F. Supp. 2d 901, 904 (N.D. Cal. 2009). Only after “the
 5 employer has such knowledge” does it have a “duty to exercise due diligence and take any and all
 6 reasonable steps to ensure that the employee is paid for the expense.” *Id.* As the court explained in
 7 *Stuart*, “if the employer had no knowledge or reason to know that the expense was incurred and the
 8 employee withheld that information, it would hardly seem fair to hold the employer accountable.” *Id.*
 9 at 902–03. Here, Albert has not even alleged that Postmates knew or had reason to know that he was
 10 incurring any work-related expenses, let alone alleged any specific facts demonstrating such
 11 knowledge. *Cf. Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1145 (9th Cir. 2012) (“[P]laintiffs
 12 must sufficiently allege that a defendant was aware of’ the circumstances giving rise to its legal
 13 obligations “to survive a motion to dismiss.”).

14 Because Albert fails to plead that Postmates had a duty under 2802 to reimburse him for any
 15 expenses, his section 2802 claim fails “as a matter of law” and should be dismissed. *Hammitt v.*
 16 *Lumber Liquidators*, 19 F. Supp. 3d 989, 1001 (S.D. Cal. 2014).

17 **2. Albert Fails to State a Claim for Minimum Wage Violations (Count II)**

18 Albert also fails to plead sufficient factual allegations to support his minimum wage claim.
 19 Albert makes only general, conclusory allegations that Postmates “failed to ensure that its couriers
 20 receive the applicable state minimum wage for all hours worked, and couriers frequently do not
 21 average minimum wage for all hours worked.” FAC ¶ 22; *see also id.* ¶ 2 (Postmates “failed to pay
 22 required minimum wage”); *id.* ¶ 38 (Postmates “fail[ed] to pay its employees minimum wage for all
 23 hours worked”).

24 In *Landers*, the Ninth Circuit explained that allegations must provide more than “generalized
 25 allegations asserting violations of the minimum wage” laws in order to survive a motion to dismiss.²

27 ² “Although *Landers* discussed FLSA claims,” courts have determined that “its reasoning applies to
 28 California Labor Code claims as well.” *Tan v. GrubHub, Inc.*, 171 F. Supp. 3d 998, 1006 (N.D.
 Cal. 2016); *see also Byrd v. Masonite Corp.*, No. EDCV 16-35 JGB (KKx), 2016 WL 756523, at
 *3 (C.D. Cal. Feb. 25, 2016).

1 *Landers*, 171 F.3d at 646. To meet this threshold, plaintiffs must provide facts “regarding a given
 2 workweek when [they] . . . [were] not paid minimum wages.” *Id.* Plaintiffs must also provide
 3 sufficient detail about the number of compensable hours worked and the amount of wages paid in
 4 order to “support a reasonable inference” of undercompensation. *See id.* For example, “[a] plaintiff
 5 may establish a plausible minimum wage claim by estimating the length of her average workweek
 6 during the applicable period and the average rate at which she was paid, . . . or any other facts that
 7 will permit the court to find plausibility.” *Id.* at 645. These specific factual allegations are necessary,
 8 the court held, in light of *Twombly* and *Iqbal*’s mandate that “a complaint must contain sufficient
 9 factual content ‘to state a claim to relief that is plausible on its face,’” and not “merely set[] forth the
 10 elements of the claim. *Id.* at 641 (quoting *Twombly*, 550 U.S. at 570).

11 Albert’s vague allegations here that Postmates “failed to ensure that its couriers receive the
 12 applicable state minimum wage for all hours worked,” and that couriers “frequently do not average
 13 minimum wage for all hours worked” fall far short of the *Landers* plausibility standard. FAC ¶ 22.
 14 Albert does not plead even basic facts about the work he allegedly performed or the circumstances
 15 under which he was allegedly paid less than minimum wage. Applying *Landers*, courts have
 16 repeatedly dismissed minimum wage claims premised on similarly threadbare allegations. *See, e.g.*,
 17 *Miller v. Amazon.com, LLC*, No. 17-cv-03488-MMC, 2018 WL 2215600, at *1 (N.D. Cal. Mar. 29,
 18 2018) (minimum wage claim dismissed where plaintiff failed “to ‘allege facts showing that there was
 19 a given week in which [she] was entitled to but denied minimum wages’” (quoting *Landers*, 771 F.3d
 20 at 645)); *Carter v. Raiser-CA, LLC*, No. 17-cv-00003-HSG, 2017 WL 4098858, at *3 (N.D. Cal.
 21 Sept. 15, 2017) (dismissing minimum wage claims where complaint alleged “in a conclusory fashion
 22 that Defendants ‘did not pay Plaintiff the prevailing minimum wage, for each hour worked’”); *Rio v.
 23 Uber Techs., Inc.*, No. 15-cv-03667-EMC, 2016 WL 10837864, at *3 (N.D. Cal. Mar. 28, 2016)
 24 (dismissing minimum wage claim where “Plaintiffs do not even allege that they were personally not
 25 paid overtime or less than minimum wage, let alone a week in which they were not paid overtime or
 26 minimum wage”); *Byrd v. Masonite Corp.*, No. EDCV 16-35 JGB (KKx), 2016 WL 756523, at *3 &
 27 n.6 (C.D. Cal. Feb. 25, 2016) (dismissing minimum wage claim because “[n]owhere in the Complaint
 28 does Plaintiff identify a specific instance in which he was denied a minimum wage”; instead, “[t]he

1 Complaint alleges only: ‘During the relevant time period, Defendants failed to pay minimum wage to
 2 Plaintiff and the other class members as required”); *Perez v. Wells Fargo & Co.*, 75 F. Supp. 3d
 3 1184, 1191 (N.D. Cal. 2014) (dismissing minimum wage claims where “there are no details pled as to
 4 any specific named plaintiff—not where he/she worked, not what his/her job duties were, not what
 5 the circumstances were under which any plaintiff was allegedly not paid minimum wage”). Non-
 6 specific allegations that couriers “frequently” do not earn minimum wage (FAC ¶ 22) are “so
 7 threadbare or speculative that they fail to cross ‘the line between the conclusory and the factual’” and
 8 should be dismissed. *Pruell v. Caritas Christi*, 678 F.3d 10, 13 (1st Cir. 2012); *see also Landers*, 771
 9 F.3d at 642, 644 (citing *Pruell* with approval).

10 Not only does the First Amended Complaint fail to describe a single instance in which Albert
 11 was paid less than minimum wage, but it also never attempts to explain the methods by which Albert
 12 calculates the minimum wages he is allegedly owed. *Landers*, 171 F.3d at 645 (“A plaintiff may
 13 establish a plausible [minimum wage] claim by estimating the length of her average workweek
 14 during the applicable period and the average rate at which she was paid”). For instance, Albert
 15 does not explain “what period of time or type of conduct [he is] counting as hours worked.” *Tan v.
 16 GrubHub, Inc.*, 171 F. Supp. 3d 998, 1008 (N.D. Cal. 2016). Albert has also not alleged any facts
 17 explaining what hourly and regular rates of pay he used to compute minimum wage pay, how he
 18 calculated those rates, or which records he consulted in doing so. *See Hall v. Plastipak*, No 15-
 19 11428, 2015 WL 5655888, at *3 (E.D. Mich. Sept. 25, 2015). Albert alleges that he received a “fee
 20 per delivery plus a certain amount of ‘boost pay,’” but he provides no additional details about the
 21 amount of fees or boost pay received or the period of compensable hours worked. FAC ¶ 22.
 22 Without “basic factual allegations” to support his minimum wage claims, Albert cannot show a
 23 plausible entitlement to relief. *Tan*, 171 F. Supp. 3d at 1008; *see also Landers*, 171 F.3d at 646.

24 Furthermore, Albert’s minimum wage claim must also fail because it is derivative of his claim
 25 for business expenses reimbursement, which is deficient for the reasons stated above. Section III.B.1,
 26 *supra*. Albert does not allege which costs, or even what types of costs, he chose to deduct when
 27 making any minimum wage calculations. *See* FAC ¶¶ 21–22, 36. Albert’s vague references to “the
 28 cost of maintaining [couriers’] vehicles, gas, insurance, and phone and data expenses,” FAC ¶ 21,

1 without more, leaves Postmates with no way of determining whether these alleged “costs” were even
 2 conceivably reimbursable expenses under any California law. *See* Section III.B.1, *supra*. Because
 3 Albert’s minimum wage claim relies on his conclusory business expenses reimbursement claim,
 4 Albert’s minimum wage claim fails. *See Lopez v. Wendy’s Int’l, Inc.*, No. CV 11-00225 MMM
 5 (JCx), 2011 WL 6967932, at *12 (C.D. Cal. Sept. 19, 2011) (minimum wage claim that was possibly
 6 derivative of a meal and rest break claim was insufficiently pleaded because the break claim on
 7 which it relied was also conclusory).

8 Albert’s minimum wage allegations do not contain “enough facts to state a claim to relief that
 9 is plausible on its face” and should be dismissed. *Twombly*, 550 U.S. at 570.

10 **3. Albert Fails to State a Willful Misclassification Claim (Count III)**

11 Albert further alleges that Postmates’ conduct “in continuing to classify couriers as
 12 independent contractors notwithstanding the California Supreme Court’s decision in *Dynamex*
 13 *Operations W., Inc. v. Superior Court*, 2018 WL 1999120 (Cal. Apr. 30, 2018) . . . violates Cal. Lab.
 14 Code § 226.8 and constitutes willful misclassification.” FAC ¶ 8. Albert’s claim fails, however, for
 15 two independent reasons: (1) there is no private right of action for violations of section 226.8, and (2)
 16 even if there was a right of action under section 226.8, Plaintiffs have not sufficiently pleaded a
 17 “willful misclassification” claim.

18 First, California courts have repeatedly held that section 226.8 does not provide a private
 19 right of action. “The existence of a private right of action depends on whether the Legislature has
 20 manifested an intent to create such a right, which is revealed through the language of the relevant
 21 statute and its legislative history.” *Villalpando v. Exel Direct Inc.*, No. 12-CV-04137 JCS, 2014 WL
 22 1338297, at *14–19 (N.D. Cal. Mar. 28, 2014) (Spero, M.J.). In *Villalpando*, this Court dismissed
 23 with prejudice a plaintiff’s section 226.8 claim for willful misclassification after finding no clear
 24 legislative intent to create a private right of action under section 226.8. *Id.* at *19, 21. Since
 25 *Villalpando*, courts in this Circuit have consistently followed its reasoning and concluded that section
 26 226.8 does not provide individual plaintiffs with a private right of action to enforce the statute. *See*,
 27 *e.g.*, *Rosset v. Hunter Eng’g Co.*, No. C 14-01701 LB, 2014 WL 3569332, at *8 (N.D. Cal. July 17,
 28 2014) (“Section 226.8 does not explicitly create a private right of action and neither the legislative

1 history nor the other Labor Code provisions impliedly create one, either.”) (citing *Villalpando*, 2014
 2 WL 1338297, at *19); *Romano v. SCI Direct, Inc.*, No. 17-cv-03537-ODW (JEM), 2017 WL
 3 8292778, at *8 (C.D. Cal. Nov. 27, 2017) (finding no private right of action for a violation of section
 4 226.8 and granting motion to dismiss the claim without leave to amend). In *Noe v. Superior Court*,
 5 237 Cal. App. 4th 316, 338 (2015), the California Court of Appeals came to the same conclusion,
 6 reasoning that “the only specific language regarding enforcement of section 226.8 appears in
 7 subdivision (g), which authorizes the Labor Commissioner”—not a private plaintiff—to enforce the
 8 statute.” Because Albert does not have a private right of action under section 226.8, his claim must
 9 be dismissed with prejudice.

10 *Second*, even if a private right of action existed under section 226.8, Albert’s claim must fail
 11 because Albert has not plausibly alleged that Postmates “willfully misclassified” him or other
 12 members of the putative class. To survive a motion to dismiss a “willful misclassification” claim, a
 13 plaintiff must plead sufficient facts to support a claim that the defendant “avoid[ed] employee status
 14 for an individual by *voluntarily and knowingly* misclassifying that individual as an independent
 15 contractor.” Cal. Lab. Code § 226.8(i)(4) (emphasis added). Albert’s allegations in the First
 16 Amended Complaint fall far short of meeting this standard. Indeed, although Albert repeatedly
 17 alleges in a conclusory fashion that “Postmates has willfully misclassified its couriers,” FAC ¶¶ 2, 23,
 18 35, “[n]oticeably absent from the Complaint are any facts which plausibly suggest that [defendant]’s
 19 alleged violations were willful.” *Kellgren v. Petco Animal Supplies, Inc.*, No. 13-CV-0644 W (KSC),
 20 2013 WL 12076473, at *3 (S.D. Cal. Sept. 13, 2013) (granting motion to dismiss where plaintiff’s
 21 allegations that defendant “willfully violated the FLSA” “lack[ed] sufficient factual matter to satisfy
 22 the plausibility standard set forth in *Iqbal* and *Twombly*”); *Wilson v. Hewlett-Packard Co.*, 668 F.3d
 23 1136, 1147–48 (9th Cir. 2012) (affirming dismissal of complaint where plaintiffs’ allegations of
 24 defendants’ knowledge were “merely conclusory”). Nor does Albert’s “formulaic recitation of the
 25 elements” of the “ABC” test set forth in *Dynamex*, FAC ¶¶ 15–18, suffice to state a claim that
 26 Postmates willfully misclassified him as an independent contractor. *Landers*, 771 F.3d at 641
 27 (“Under *Twombly*, a complaint that offers . . . ‘a formulaic recitation of the elements of a cause of
 28 action[,]’ . . . will not suffice.” (quoting *Twombly*, 550 U.S. at 555, 557)). In short, because Albert

has not pleaded even the most basic facts to support his allegation that Postmates “willfully misclassified” couriers as independent contractors, he cannot show plausible entitlement to relief.

For these reasons, Albert's willful misclassification claim should be dismissed without leave to amend.

4. Albert Fails to State a Claim for Unlawful or Unfair Business Practices (Count IV)

Albert’s claim under the California Business and Professions Code derives entirely from the preceding three claims. In Count IV of the First Amended Complaint, Albert alleges that Postmates’ conduct “constitutes unlawful business acts or practices, in that Defendant has violated California Labor Code Sections 2802, 1194, 1197, and 226.8.” FAC ¶ 37. Because Albert has failed to state a plausible claim for relief under any of the predicate statutes (see Sections III.B.1, 2, and 3), this derivative claim also fails and should be dismissed. *See, e.g., Smith v. Level 3 Commc’ns Inc.*, No. C 14-05036 WHA, 2014 WL 7463803, at *4 (N.D. Cal. Dec. 30, 2014) (“To state a claim under Section 17200, a plaintiff must adequately plead a violation of a specific alternative statute.”); *see also Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1182 (9th Cir. 2003) (where a “claim under § 17200 is dependent” on another claim, the two claims “rise and fall together” (internal quotation marks omitted)).

5. Albert Fails to State a Claim for Unpaid Wages (Count V)

Albert’s claim for unpaid wages under California Labor Code section 204 must also be dismissed. Section 204 requires that “[a]ll wages, other than those mentioned in Section 201, 201.3, 202, 204.1, or 204.2, earned by any person in any employment” be paid “twice during each calendar month, on days designated in advance by the employer as the regular paydays.” Cal. Lab. Code § 204(a). Albert alleges that Postmates violated section 204 when it “fail[ed] to pay its employees for the entirety of their wait time.” FAC ¶ 38. Albert alleges that Postmates contracted with couriers to pay a specified rate, “typically between 7 and 12 cents per minute,” while couriers are “waiting at the delivery pickup,” but that Postmates “has failed to ensure that couriers are paid the correct amount for their wait time and has shortchanged couriers by underreporting the amount of time that couriers spend waiting for a delivery.” *Id.* ¶ 24.

1 Albert fails to allege sufficient facts showing a plausible entitlement to unpaid wages for
 2 “waiting time.” As a preliminary matter, Albert does not plead any facts relating to a single example
 3 of a time when he should have been compensated for “waiting time” but was not. *Byrd v. Masonite*
 4 *Corp.*, 2016 WL 756523, at *4 & n.10 (C.D. Cal. Feb. 25, 2016) (dismissing claim where the plaintiff
 5 did not allege “a single instance in which [the defendant] failed to pay Plaintiff all wages due to him
 6 during his employment”; instead, the plaintiff alleged only that “[d]uring the relevant time period,
 7 Defendants intentionally and willfully failed to pay Plaintiff and the other class members all wages
 8 due to them”). Nor does the First Amended Complaint offer facts relating to Albert’s alleged
 9 agreement with Postmates that would entitle him to “waiting time” compensation in the first place.

10 Furthermore, as with his minimum wage claim, Albert does not explain his methods for
 11 calculating the “correct amount for [couriers’] wait time.” FAC ¶ 38. As the California Supreme
 12 Court made clear in *Mendiola v. CPS Security Solutions, Inc.*, 60 Cal. 4th 833 (2015), not all “on-call
 13 time constitutes hours worked,” and courts must instead weigh a host of factors “to determine
 14 whether on-call time is compensable in a given case.” *Id.* at 840–41. Specifically, “courts
 15 considering whether on-call time constitutes hours worked have primarily focused on the extent of
 16 the employer’s control,” and that fact-intensive inquiry turns on “various factors,” including, for
 17 example, whether the plaintiff “actually engaged in personal activities during call-in time.” *Id.* at
 18 840–41. In addition, courts consider whether the “[o]n-call waiting time . . . is spent primarily for the
 19 benefit of the employer and its business.” *Gomez v. Lincare, Inc.*, 173 Cal. App. 4th 508, 523–24
 20 (2009) (on-call time was not compensable where plaintiffs “confirmed they had engaged in some
 21 personal activities while on call”).

22 Here, Albert does not explain when he believes couriers’ compensable “waiting” time begins
 23 (e.g., when a courier first contacts a local merchant regarding a pending order, when a courier arrives
 24 at the local merchant’s store to pick up an order, etc.) or what constitutes compensable time (e.g.,
 25 whether couriers are entitled to “waiting time” pay when they are waiting for one order while also
 26 performing compensable tasks for another order, whether couriers are entitled to “waiting time” pay
 27 if they are free to engage in personal activities during that time, or whether couriers waiting on two
 28 orders simultaneously can collect double “waiting time” pay). Given that the measurement of

1 compensable waiting time “is a fact-specific inquiry,” such additional facts are necessary to support a
 2 “reasonable inference” that Albert was not paid wages to which he was entitled. *Yucesoy v. Uber*
 3 *Techs., Inc.*, No. 15-cv-262-EMC, 2016 WL 493189, at *5–6 (N.D. Cal. Feb. 9, 2016) (dismissing
 4 overtime and minimum wage claims for failure to allege sufficient facts to show why waiting time is
 5 compensable); *see also Rio*, 2016 WL 10837864, at *3 (dismissing claims where plaintiffs failed to
 6 explain “how they define ‘work,’ i.e., whether Plaintiffs contend that the drivers [are] at work
 7 whenever the Uber app is on”); *Landers*, 771 F.3d at 646 (dismissing overtime wage claims for
 8 failure to plead sufficient facts); *Owens v. Local No. 169*, 971 F.2d 347, 351 (9th Cir. 1992) (listing
 9 factors to consider in analyzing the degree to which employee is free to engage in personal activities,
 10 such as whether the frequency of calls was unduly restrictive and whether a fixed time limit for
 11 responses was unduly restrictive). In the absence of more specific facts, “Plaintiff[‘s] theory is
 12 unclear’ as to whether and when he may be entitled to compensation for “wait time.” *Yucesoy v.*
 13 *Uber Techs., Inc.*, No. 15-cv-262-EMC, 2015 WL 6955410, at *4 (N.D. Cal. Nov. 10, 2015)
 14 (plaintiff’s claims failed where he “provided no information for how this hourly amount was
 15 calculated and why [his] hours logged … should be considered compensable time”).

16 Albert’s “generalized allegations” regarding unpaid “waiting time” wages do not cross the
 17 line from “possibility” to “plausibility” and should be dismissed. *Landers*, 771 F.3d at 646.

18 **6. Albert Fails to State a Claim for Breach of Contract (Count VI)**

19 Finally, Count VI alleges that Postmates “has a contract with couriers to properly calculate
 20 and remit to them payment for their ‘wait time’ at the rate specified for their market,” and “underpaid
 21 couriers for their wait time in violation of the contract.” FAC ¶ 38. Albert’s breach of contract claim
 22 fails, however, because it is superseded by Albert’s section 204 claim. And in any event, Albert’s
 23 allegations are wholly insufficient to support a breach of contract claim on which relief may be
 24 granted.

25 Under California law, “where a statute creates a right that did not exist at common law and
 26 provides a comprehensive and detailed remedial scheme for its enforcement, the statutory remedy is
 27 exclusive.” *In re Wal-Mart Stores, Inc. Wage & Hour Litig.*, 505 F. Supp. 2d 609, 618 (N.D. Cal.
 28 2007) (citing *Rojo v. Kliger*, 52 Cal. 3d 65, 79 (1990)); *see also Thomas v. Home Depot, USA, Inc.*,

1 527 F. Supp. 2d 1003, 1009 (N.D. Cal. 2007) (dismissing plaintiff's conversion claim as improper
 2 where plaintiff alleged conversion based on Labor Code violations). Federal courts have consistently
 3 found that the California Labor Code provides a "comprehensive and detailed remedial scheme" that
 4 preempts common law claims for violations of the statute. *See, e.g., Wal-Mart Stores*, 505 F. Supp.
 5 2d at 618–19; *Green v. Party City Corp.*, No. CV-01-09681 CAS (EX), 2002 WL 553219, at *4
 6 (C.D. Cal. Apr. 9, 2002); *Bright v. Dennis Garberg & Assocs.*, No. CV 10-07933 AHM (JCx), 2011
 7 WL 13147441, at *5 (C.D. Cal. May 4, 2011). A common law claim that is based on an alleged
 8 Labor Code violation therefore cannot stand because the legislature has already created an extensive
 9 remedial scheme to address violations.

10 Here, all of Albert's breach of contract allegations are based on the comprehensive remedial
 11 scheme provided by the Labor Code, which governs wages and hours worked. Moreover, Albert's
 12 breach of contract claim is specifically premised on Postmates' alleged violation of section 204 of the
 13 Labor Code by underpaying couriers for wait time. FAC ¶ 38. Indeed, both claims are based on the
 14 exact same allegations and seek the same relief. *See* FAC ¶ 24 ("Postmates has failed to ensure that
 15 couriers are paid the correct amount for their wait time. . . . Thus, Postmates has failed to pay couriers
 16 the monies they are owed under the contract, which constitutes a breach of contract and a failure to
 17 pay all earned wages."). Accordingly, Albert's section 204 claim supersedes and preempts his
 18 common law breach of contract claim, which must be dismissed.

19 Even if Albert's breach of contract claim is not superseded, his claim would still fail because
 20 Albert has not pleaded sufficient facts to satisfy the *Iqbal* and *Twombly* standard. "To state a claim
 21 for breach of contract under California law, a plaintiff must allege (1) the existence of a contract; (2)
 22 that he has performed or that his nonperformance is excused; (3) defendant's breach of the contract;
 23 and (4) damages resulting from the breach." *Greenwich Ins. Co. v. Rodgers*, 729 F. Supp. 2d 1158,
 24 1163 (C.D. Cal. 2010). Albert's allegations fall far short. For example, Albert fails to offer sufficient
 25 facts relating to the terms of the "payment schedule" that allegedly provides for "waiting time"
 26 compensation, which is not contained in the Fleet Agreement. Furthermore, Albert's sole allegation
 27 regarding Postmates' alleged breach is that Postmates "has failed to ensure that couriers are paid the
 28 correct amount for their wait time and has shortchanged couriers by underreporting the amount of

1 time that couriers spend waiting for a delivery.” FAC ¶ 24. But as explained above, *see* Section
 2 III.B.5, Albert does not allege any specific instances when Postmates failed to adequately pay him for
 3 “wait time,” nor does he provide any explanation about how Postmates allegedly “underreport[ed]”
 4 his “wait time.” Albert’s sixth cause of action therefore must be dismissed.

5 **IV. CONCLUSION**

6 For the foregoing reasons, Postmates respectfully requests that this Court enter an order:
 7 (1) compelling Timmerman to arbitrate her claims on an individual basis and staying her claims
 8 pending arbitration; and (2) dismissing Albert’s claims for failure to state a claim under Federal Rule
 9 of Civil Procedure 12(b)(6).

10 DATED: November 5, 2018

11 GIBSON, DUNN & CRUTCHER LLP

12 /s/ Theane Evangelis

13 Theane Evangelis

14 Attorneys for Defendant POSTMATES INC.

15

16

17 **CERTIFICATE OF SERVICE**

18 I hereby certify that a copy of this document was served by electronic filing on November 5,
 19 2018, on all counsel of record.

20

21 /s/ Theane Evangelis

22 Theane Evangelis

23 Attorneys for Defendant POSTMATES INC.